Supreme Court, U.S.
FILED
JAN 21 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-822

In the Supreme Court of the United States

OCTOBER TERM, 1985

AMOCO PRODUCTION COMPANY, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the Equal Employment Opportunity Commission may continue to prosecute its complaint in intervention following the settlement and dismissal of private plaintiffs' individual claims, when the EEOC has satisfied the statutory prerequisites for intervention set forth in Section 706(f)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(f)(1), but has not also satisfied the requirements for initiating a direct suit set forth in Section 706(b), 42 U.S.C. 2000e-5(b).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-33a) is reported at 768 F.2d 669. The district court's order of dismissal (Pet. App. 34a-35a) and denial of rehearing (Pet. App. 36a-38a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 16, 1985. The petition for writ of certiorari was filed on November 14, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In December 1976, four employees of the petitioner Amoco Production Company (Amoco) commenced this action, alleging widespread employment discrimination against blacks in the areas of initial job assignment, promotion, and compensation in violation of Title VII of the Civil

Rights Act of 1964, 42 U.S.C. 2000e *et seq.* Pet. App. 3a. Plaintiffs sought to represent a class of black employees at the New Orleans division of Amoco. *Ibid.*

One year later, in December 1977, respondent Equal Employment Opportunity Commission certified this action to be of "general public importance" and moved to intervene pursuant to Sections 705(g)(6) and 706(f)(1) of Title VII, 42 U.S.C. 2000e-4(g)(6) and 5(f)(1), and Fed. R. Civ. P. 24(b). Pet. App. 3a-5a. The Commission's complaint in intervention charged petitioner with the same discriminatory employment practices as plaintiff's complaint and sought relief for the class adversely affected by these practices. *Id.* at 5a. In March 1978, the district court exercised its discretion to permit the EEOC to intervene. *Ibid.*

In 1982, the district court provisionally denied plaintiffs' motion to certify the class, but preserved their right to renew the request if supported by additional evidence. Pet. App. 6a. The court also ruled that because the requirements of Fed. R. Civ. P. 23(a) had not been met, the Commission could not pursue the class claims either, holding that this Court's decision in *General Telephone Co.* v. *EEOC*, 446 U.S. 318 (1980), applied only when the Commission sued directly. Pet. App. 6a.

However, the private plaintiffs did not renew their motion for class certification because they settled their claims with petitioner and moved to dismiss. Pet. App. 7a. The district court granted the motion and dismissed the entire action, including the Commission's complaint in intervention, with prejudice. The Commission moved for reconsideration of the dismissal, but the district court denied the motion, ruling that "there remains no live controversy by the Commission against [petitioner]"(Pet. App. 36a).

2. The court of appeals reversed (Pet. App. 1a-33a). It first held that the Commission's complaint had sufficient vitality to survive the dismissal of the complaint filed by the original plaintiffs, because Title VII, by authorizing the Commission to intervene in pending suits, provided an independent basis for jurisdiction. *Id.* at 24a. The court rejected the argument that the EEOC must comply with the requirements for initiating direct suit in order to have any status greater than an amicus curiae when it intervenes. Pet. App. 16a-17a. Second, the court held that this Court's ruling in *General Telephone Co.* v. *EEOC, supra*, that the EEOC can seek class wide relief without satisfying the requirements of Rule 23(a), applies whether the Commission initiated the litigation or merely intervened in an ongoing suit. Pet. App. 26a-27a. Therefore, because the EEOC had standing to assert the class allegations against petitioner, a justiciable controversy still existed despite the dismissal of the original plaintiffs. Accordingly, the court of appeals directed the district court to reinstate the Commission's complaint. *Id.* at 33a.

ARGUMENT

The court below held that once the EEOC has satisfied the statutory prerequisites for intervention and the district court has exercised its discretion to grant intervention, the Commission has authority to litigate its claims to judgment even if the original plaintiffs depart. This unexceptional ruling, which is in accord with the letter and spirit of Title VII, as well as the case law governing permissive intervention, does not conflict with any decision of this Court or of any other court of appeals. Accordingly, review by this Court of petitioner's claims is not warranted.

1. To begin with, the court of appeals correctly held that neither the text of Title VII, its legislative history, nor its underlying purposes requires the Commission, before intervening, to complete the administrative procedures necessary before the EEOC can bring suit in its own name. Pet.

App. 12a-27a. Title VII provides two alternative ways in which the EEOC may seek to enforce the Act in federal court. First, the Commission may initiate its own enforcement action if, following an investigation and a finding of reasonable cause to believe that the Act has been violated, the Commission is unable to obtain a voluntary settlement. Section 706(b), 42 U.S.C. 2000e-5(b). Second, if a charging party has initiated its own civil action, the Commission may seek to intervene "upon certification that the case is of general public importance." Application for leave to intervene must be timely, and the granting of leave to intervene is by the court's discretion. Section 706(f)(1), 42 U.S.C. 2000e-5(f)(1); see Pet. App. 12a. Congress authorized the Commission to intervene in private suits to enable the Commission to protect the public interest when litigation is commenced by the charging party, often before the full administrative process is completed.[1] Senator Williams made this point when he introduced the amendment granting the Commission the authority to intervene (118 Cong. Rec. 4814 (1972)): "The amendment is to clear up an inconsistency whereby the general counsel of the Commission may bring a civil action for the Commission, but might not be able to protect the Commission's interest in a case where [a] private litigant is involved." The Commission's interest — "to vindicate the public interest in preventing employment discrimination" (*General Telephone Co.* v. *EEOC*, 446 U.S. 318, 326 (1980)) — is precisely the same whether the Commission proceeds by direct suit or by intervention.

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[1]Section 706(f) allows a private party to file suit 180 days after the filing of the charge or upon conclusion of the administrative process. 42 U.S.C. 2000e-5(f). In this case, two of the plaintiffs filed suit after 180 days had passed, and one plaintiff filed suit at the end of the process when the EEOC could not conciliate the charge but decided not to initiate its own suit. Pet. App. 3a n.2.

That interest is surely not protected by petitioner's construction of the statute. Petitioner's construction of Title VII would make the EEOC's role contingent upon the actions of private litigants and thereby relegate the EEOC to the role of an amicus curiae. If Congress had intended the Commission's role to be limited in the manner petitioner suggests, Congress would simply have relied on Fed. R. Civ. P. 24(b)(2), which already authorized such limited participation. In short, it is clear from both the language and structure of the Act and from its legislative history that Congress intended that the Commission would play the same role in both types of suit. See *United Telecommunications, Inc.* v. *Saffels*, 741 F.2d 312, 314 (10th Cir. 1984), cert. denied, No. 84-1002 (Mar. 18, 1985).

Petitioner's argument is not strengthened by its claim that the Commission can avoid dismissal by satisfying the statutory prerequisites for direct suit. First, Section 706(f)(1) clearly provides that intervention is an alternative route to court, and nothing in the statute or its legislative history suggests that the prerequisites are conjunctive. See *United Telecommunications, Inc.* v. *Saffels*, 741 F.2d at 314; *United States Fidelity & Guaranty Co.* v. *Lord*, 585 F.2d 860, 866 (8th Cir. 1978), cert. denied, 440 U.S. 913 (1979); *Johnson* v. *Nekoosa-Edwards Paper Co.*, 558 F.2d 841, 847 (8th Cir.), cert. denied, 434 U.S. 920 (1977). Moreover, as the court of appeals explained (Pet. App. 16a-17a), requiring compliance with the prerequisites for direct suit before intervention is neither practical nor reasonable. It is not practical because, as the Eighth Circuit recognized in *Nekoosa*, if the Commission were required to complete its administrative process before intervening, there would be a substantial risk that its intervention would be

untimely (see 558 F.2d at 847).[2] Such a requirement is also not reasonable, since the purposes of the direct suit prerequisites — to give the employer notice of litigable claims and to resolve disputes prior to litigation — disappear with the filing of a private suit. The service of the charging party's complaint provides notice and negates the possibility of pre-suit settlement. Moreover, if the district court believes that further efforts at voluntary resolution might prove fruitful, the Act specifically provides for a stay of the litigation at the court's discretion to allow such efforts to take place. Section 706(f)(1), 42 U.S.C. 2000e-5(f)(1).

Second, as the court of appeals explained (Pet. App. 14a-24a), because Congress authorized the EEOC to enforce Title VII by means of intervention, there is an independent jurisdictional basis for the Commission's claims. Accordingly, the Commission fits within the well-established rule that an intervenor may continue to litigate its claims after dismissal of the original plaintiff when there is such an independent jurisdictional basis.[3]

Petitioner erroneously asserts (Pet. 6-11) that the decision below conflicts with *Horn* v. *Eltra Corp.*, 686 F.2d 439 (6th Cir. 1982). In *Horn*, the EEOC was dismissed from a private suit after the Commission had been granted leave to intervene. While the EEOC's appeal of the district court's

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[2]That is a matter of considerable importance given the complexity of the charges often filed and the length of time necessary to complete the "integrated, multistep enforcement procedure" established by Title VII (*Occidental Life Ins. Co.* v. *EEOC*, 432 U.S. 355, 359 (1977); *EEOC* v. *Shell Oil Co.*, No. 82-825 (Apr. 2, 1984), slip op. 6-9).

[3]See, *e.g.*, *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424, 431 (1976) (United States as intervenor allowed to continue as a party plaintiff in the action although the claims of the original plaintiffs had become moot and a class was never certified); Pet. App. 11a-12a (collecting cases); 7A C. Wright & A. Miller, *Federal Practice and Procedure* § 1920, at 613 (1972).

revocation order was pending, the private parties settled the action and the plaintiff dismissed her suit. The court of appeals treated the Commission's appeal from the revocation order as a new application to intervene and held that the EEOC could not intervene in an already-settled private action without satisfying the statutory requirements for bringing a direct suit.[4] *Horn* thus stands for the unremarkable proposition that the EEOC cannot intervene in a case that is moot. That decision, however, did not resolve the scope of EEOC's authority to intervene or to seek classwide relief in a pending suit. Petitioner's reliance upon *Horn* is therefore misplaced.[5]

2. Petitioners do not seriously dispute the court of appeals' holding that neither the text of Sections 705(g)(6) and 706(f)(1) of Title VII nor the legislative history of those provisions (Pet. App. 13a-16a) requires the Commission, before intervening, to complete the administrative procedures necessary before the EEOC can bring suit in its own name. Nor do petitioners ask the Court to reconsider its holding in *General Telephone Co.* v. *EEOC*, *supra*, that the EEOC may seek classwide relief without satisfying the requirements of Fed. R. Civ. P. 23. Rather, petitioners claim (Pet. 12-16) that, as a matter of policy, the EEOC should be denied the right to pursue such claims as an

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[4]It is clear that the court in *Horn* viewed the EEOC's appeal in that manner. As the court below recognized (Pet. App. 23a n.21), *Horn* based its ruling entirely on decisions involving a party's attempt to intervene in a suit where either the entire original action or particular claims of the original plaintiff had already been dismissed. See cases cited at 686 F.2d at 440.

[5]In addition to the court below (Pet. App. 23a n.21), at least one other court, which is in the Sixth Circuit, has adopted this interpretation of *Horn*. See *EEOC* v. *Dayton Tire & Rubber Co.*, 573 F. Supp. 782, 786 n.5 (S.D. Ohio 1983). We are aware of no decisions adopting petitioner's interpretation of *Horn*.

intervenor until it has completed the Section 706(b) administrative prerequisites to a direct action. That claim is without merit.

The short answer to petitioners' argument is that, as the court of appeals recognized (Pet. App. 14a-15a), Congress expressly authorized the procedure followed by the EEOC in this case. Congress could easily have drafted the intervention provision of Section 706(f)(1) to parallel the direct suit component of that section, but Congress did not, and the courts may not attribute that difference to legislative oversight (see, *e.g.*, *Russello* v. *United States*, 464 U.S. 16, 23 (1983)). Because nothing in the legislative history of Section 706(f)(1) disclosed "a clearly expressed legislative intention to the contrary," the unambiguous language of Section 706(f)(1) is "conclusive" (*Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)).

Petitioner's reliance (Pet. 12-13) upon *General Telephone Co* v. *Falcon*, 457 U.S. 147 (1982), is misplaced. There, the Court held that a plaintiff who alleged that he had been passed over for promotion because of his national origin could not maintain a class action on behalf of employment applicants whom the defendant did not hire. 457 U.S. at 157-161. *Falcon* nowhere suggested that the rule there adopted conditions the Commission's authority either to intervene in a pending Title VII action or to seek class-wide relief once the Commission is a party to an action. Indeed, *Falcon* expressly distinguished the Court's ruling in *General Telephone Co.*. See 457 U.S. at 156.[6]

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[6]Petitioner errs in relying (Pet. 15) on *EEOC* v. *D.H. Holmes Co.*, 556 F.2d 787 (5th Cir. 1977), cert. denied, 436 U.S. 962 (1978). This Court overruled *Holmes* in *General Telephone Co.*.

Nor do the policy considerations invoked by petitioners justify rewriting the statute. Congress required the Commission to investigate a claim of discrimination, to find reasonable cause to believe that the claim is true, and to attempt conciliation before filing a direct suit to ensure that all reasonable possibilities of voluntary compliance have been exhausted before the Commission resorts to litigation. See *EEOC* v. *Shell Oil Co.*, No. 82-825 (Apr. 2, 1984), slip op. 22; *Occidental Life Ins. Co.* v. *EEOC*, 432 U.S. at 367-368; *Johnson* v. *Nekoosa-Edwards Paper Co.*, 558 F.3d at 847. Once a private party has filed suit, however, the possibility of securing voluntary compliance is, at least, greatly diminished, and any marginal contribution toward that goal resulting from continued efforts at conciliation would be more than offset by the difficulties that the EEOC would face in its investigation of an actual, rather than a potential, defendant. Cf. *EEOC* v. *Shell Oil Co.*, slip op. 14, 25-26. In any event, Section 706(f)(1) empowers a court to stay proceedings up to 60 days pending the Commission's efforts at voluntary compliance. That procedure provides a mechanism through which litigation can still be avoided even though suit has been filed and the EEOC has intervened.

As the Court explained in *General Telephone Co.*, the "EEOC is not merely a proxy for the victims of discrimination and * * * [its] enforcement suits should not be considered representative actions subject to Rule 23." 446 U.S. at 326. The Commission is no more a proxy when it intervenes than when it sues directly. The statutory grant of authority to enforce the Act contained in Section 706(a), 42 U.S.C. 2000e-5(a), upon which this Court relied (*General Telephone Co.*, 446 U.S. at 323), applies to both direct suits and

interventions.[7] Moreover, the difficulties attendant upon the application of Rule 23 to suits brought by the Commission (446 U.S. at 329-331) are as troublesome when the Commission intervenes as when it files a direct suit. Accordingly, the court of appeals correctly held that the EEOC need not satisfy the requirements of Fed. R. Civ. P. 23 before seeking classwide relief as an intervenor. Accord *United Telecommunications, Inc.* v. *Saffels*, 741 F.2d at 314; *Fields* v. *Beech Aircraft Corp.*, 95 F.R.D. 1 (D. Kan. 1981); see also *Johnson* v. *Nekoosa-Edwards Paper Co.*, 558 F.2d at 847.

Petitioner also argues (Pet. 12-13) that the decision below will encourage the EEOC to use its intervention authority to evade the statutory prerequisites for direct suit. However, there is no evidence to support petitioner's claim. Beyond that, any claim that the EEOC can itself unwarrantedly and burdensomely transform private claims for relief into class actions overlooks the fact that the Commission's right to intervene in private Title VII actions is subject to the discretion of the district court, which retains the authority to limit the claims that the Commission may raise to those already presented by a private plaintiff. Petitioners do not challenge in this Court the district court's decision to allow the Commission to intervene. Moreover, as the court of appeals noted, "[t]he record in this case is devoid of any suggestion that the Commission has attempted to abuse its authority to intervene," and because intervention is at the discretion of the district court, the court can adequately protect against possible abuse. Pet. App. 16a-17a n.16. The court of appeals' decision also does not restrict a district court's

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[7]Section 706(a), 42 U.S.C. 2000e-5(a), provides:

> The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title.

ability to stay further proceedings to allow the parties to attempt settlement if the court believes that doing so may be useful. More fundamentally, petitioners have cited no evidence that Congress intended to restrict the EEOC's authority to protect the public interest once the Commission has intervened in a private suit. Petitioner's real complaint therefore is not with the court of appeals' decision, but is with this Court's decision in *General Telephone Co.* v. *EEOC, supra*.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1986